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Notes

The California Hospital Lien Act and "Balance Billing": Protecting Innocent Patients' Right to Limit a Medical Care Provider's Recovery By Statutory Lien

DARIEN J. COVELENS*

THE *PARNELL* SCENARIO[1]

After a long day of work, Joel Parnell decides to hire a taxicab to drive him home. While Parnell rides as a passenger in the taxi, the driver cautiously proceeds through a four-way stop intersection. Unbeknownst to the taxi driver or Parnell, another man (the "Tortfeasor") is also driving home from work and approaches the same intersection from another direction. The Tortfeasor is speeding excessively and negligently fails to stop or even slow down at the same four-way intersection. The Tortfeasor's pickup truck slams into the side of Parnell's taxi as his driver passes through the middle of the intersection and seriously injures Parnell. Parnell is rushed to nearby San Joaquin Community Hospital where he is treated for his injuries. Parnell eventually makes a full recovery.

San Joaquin Community Hospital has a specific contractual agreement with Parnell's medical insurance carrier,[2] Wholesale Beer

* J.D. Candidate, University of California, Hastings College of the Law, 2005; B.S. Eastern Mennonite University, 2001. I would especially like to thank Marcia Augsburger for her valuable comments, suggestions, and insight over the past year, without which this writing would have been not have been possible.

1. The brief facts described in *Parnell v. Adventist Health System/West*, 131 Cal. Rptr. 2d 148, 151 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (2003), a case currently before the California Supreme Court, have been augmented here to assist the reader's understanding of the complex results when applying the California Hospital Lien Act. Hypothetical figures have been added to illustrate the differing amounts recoverable by a patient.

2. Most hospital systems and medical service providers have agreed-upon contractual rates with regional and national health insurance carriers. *See, e.g.*, Swanson v. St. John's Reg'l Med. Ctr., 118

Distributor Industry Trust Health Plan. Under this agreement, any health care services provided to members of Parnell's insurance carrier are paid by the insurance carrier at discounted rates. A person paying cash for exactly the same medical services would pay a much larger amount ("customary rates").

For purposes of this Note, assume that San Joaquin Community Hospital charges Parnell's insurance carrier $100,000 for Parnell's injuries, while the customary rates listed in San Joaquin's price schedule for the same services is $230,000. The insurance carrier pays San Joaquin the negotiated discount rates for Parnell's health care and closes the insurance report. Both Parnell and his insurance carrier assume the payment of health care costs is complete.

Meanwhile, Parnell files a separate negligence suit against the Tortfeasor for his injuries. Again, for purposes of this Note's analysis, assume that Parnell recovers a $250,000 judgment in California state court. Several days after the judgment is finalized, Parnell receives a notice of lien from San Joaquin Community Hospital.[3] The notice of lien informs him that the hospital has asserted a statutory lien against Parnell's recovery under the California Hospital Lien Act for San Joaquin's "usual and customary charges." The notice of lien declares that San Joaquin is entitled to an additional $130,000 from Parnell's judgment to recover the difference between the discounted rates paid by Parnell's health insurance carrier ($100,000) and San Joaquin's customary rates listed under its price schedule ($230,000). Parnell challenges the lien in California Superior Court. He contends that the insurance carrier's payment to San Joaquin at the discounted rates alleviates him from any obligation to pay the hospital from his judgment, citing authority from the First District of the California Court of Appeal. San Joaquin Community Hospital's counsel counters with authority from the Second District allowing recovery of the difference between San Joaquin's discounted and customary rates.

INTRODUCTION

While the figures described above are assumed for explanatory purposes, the scenario matches that presented in *Parnell v. Adventist Health System/West*, a case currently before the California Supreme Court. The California Courts of Appeal are split over the issue of whether the California Hospital Lien Act ("HLA") allows medical care providers to recover from patients the difference between their

Cal. Rptr. 2d 325, 328 (Cal. Ct. App. 2002); Whiteside v. Tenet Healthcare Corp., 124 Cal. Rptr. 2d 580, 582–83 (Cal. Ct. App. 2002). Discounted and customary charges are discussed in more detail below.

3. Assume the lien notice complies with CAL. CIV. CODE § 3045.3 (West 1993).

customary rates and the negotiated discount rates paid by health insurance carriers. This practice is known as "balance billing."[4] The California Supreme Court has, until now, declined to resolve the "purported conflict" between the Courts of Appeal.[5]

This Note analyzes the practice of so-called balance billing by statutory lien in California. Balance billing occurs when a medical care provider accepts a discounted payment from an insurance carrier as payment in full and then attempts to recover the balance of its customary rates from the patient.[6] Generally, balance billing is prohibited by California law.[7] At least one court has held that a medical care provider attempting to recover costs based on its customary rates by HLA lien after receiving payment pursuant to discounted rates constitutes balance billing.[8]

In particular, this Note addresses the split in the California Courts of Appeal and analyzes the legal and practical effects of applying each of the two leading authorities. Such a recovery presents a two-faceted dilemma. On the one hand, there is a strong argument that because the medical care provider has specifically contracted for discounted rates with a health insurance carrier, its lien recovery should be limited to that amount.[9] In addition, medical care providers are often more able to bear the costs of medical care than patients under the economic cost/benefit model. On the other hand, a strong policy argument supports recovery for the medical care provider. If medical care providers (such as hospitals, clinics, medical groups, etc.) are not allowed to recover some of the difference between their customary and discounted rates, then there is less of an incentive for these providers to offer beneficial or essential medical services to other patients.

The first Section of this Note describes hospital billing practices, gives a brief overview of statutory liens, and examines the history of the California Hospital Lien Act. The second Section considers the two major cases where California courts have confronted the issue of balance

4. *Compare* Nishihama v. City & County of San Francisco, 112 Cal. Rptr. 2d 861, 867–68 (Cal. Ct. App. 2001) (holding that "balance billing" is prohibited by California law) *with Swanson*, 118 Cal. Rptr. 2d at 330 (allowing "balance billing").

5. Olszewski v. Scripps Health, 69 P.3d 927, 944 n.19 (Cal. 2003) (stating that *Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos.*, 932 P.2d 210 (Cal. 1997) was inapplicable and there was no need to resolve any "purported conflict" between *Nishihama* and *Swanson*).

6. *Whiteside*, 124 Cal. Rptr. 2d at 584.

7. CAL. HEALTH & SAFETY CODE § 1379 (West 2000). Section 1379 provides in pertinent part, "[e]very contract between a [health] plan and a provider of health care services shall . . . set forth that in the event the plan fails to pay for health care services . . . *the subscriber or enrollee shall not be liable to the provider for any sums owed by the plan.*" *Id.* § 1379(a) (emphasis added).

8. *See Nishihama*, 112 Cal. Rptr. 2d at 867–68 (holding that medical care providers asserting a lien on judgments levied against third parties may only recover up to the discounted rates under the HLA).

9. *See, e.g., id.* at 866–67.

billing. This Note then applies the reasoning of both the *Nishihama v. City and County of San Francisco*[10] and *Swanson v. St. John's Regional Medical Center*[11] cases to the facts of the Parnell Scenario and analyze the results. Each case's application to the Parnell Scenario described above drastically changes the patient's and medical care provider's net recovery under the HLA.

The third Section of this Note argues that California courts should follow the *Nishihama* court's interpretation of the HLA because it is a more reasonable and equitable solution to the issue of balance billing. The third Section also suggests that California courts should not follow the *Swanson* court's interpretation of the HLA because that court misinterpreted California law and reached a less equitable solution than the *Nishihama* decision.

The fourth Section of the Note concludes that the *Parnell v. Adventist Health System/West* case currently before the California Supreme Court should end the appellate court dispute over the balance billing issue. The California Supreme Court should follow the *Nishihama* court's reasoning and disallow balance billing in California.

I. HOSPITAL LIENS IN CALIFORNIA

A. HOSPITAL CHARGES

Insurance companies have employed a number of different financial vehicles in an attempt to slow the exponential growth of medical care costs.[12] These vehicles attempt to limit the costs of medical insurance to members while allowing the insurance companies to remain profitable.[13] The result is a marked difference between the actual costs that medical care providers list on their internal price schedules ("usual and customary rates") and the amount actually paid for such services ("discounted rates") by health insurance carriers.[14]

A useful analogy for understanding the two types of medical care rates is that of motel rates charged to visiting guests.[15] A hospital's "usual and customary" rates are analogous to the rates listed by motels on their

10. *Id.* at 861.

11. Swanson v. St. John's Reg'l Med. Ctr., 118 Cal. Rptr. 2d 325 (Cal. Ct. App. 2002).

12. Such vehicles include "preferred provider agreements" and capitation-based health maintenance organizations ("HMOs"). Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148, 151 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (Cal. 2003). A description of these financial vehicles is beyond the scope of this Note.

13. *See id.*

14. Telephone Interview with Marcia Augsburger, Shareholder, McDonough, Holland & Allen P.C. (Dec. 17, 2003); *see also Parnell*, 131 Cal. Rptr. 2d at 151–52.

15. Telephone Interview with Stephen C. Ruehmann, Shareholder, McDonough, Holland & Allen P.C., (Dec. 19, 2003).

internal price schedules—high rates that very few persons actually pay.[16] Typically, only unprepared travelers pay the hotel's full listed rates. Similarly, very few patients actually pay a hospital's usual and customary rates.[17] In fact, the only way a patient is likely to pay a hospital's customary rates is if the patient is uninsured and pays cash.[18] The discounted rates typically paid by health insurance carriers are similar to the various discounts available to experienced and travel-savvy motel guests.[19]

Contracted rates between medical care providers and health insurance carriers are often complex and multi-tiered documents.[20] These contracts typically require health insurance carriers to encourage their members to use "preferred provider" medical care providers instead of the member's hospital of choice.[21] In addition, such contracts normally require the health insurance carrier to reimburse the hospitals according to the negotiated discount rates and require the hospital to consider the insurer's reimbursement as payment in full.[22]

B. LIENS

Under California law, a lien is a "charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act."[23] Thus, a lien typically does not create a right in the property itself, but rather a right to levy on the property and sell it for satisfaction of the debt.[24]

A lien may be created by contract or by operation of law.[25] At common law, the validity of a lien depended on an actual and continued possession of the property.[26] Common law courts have allowed liens in favor of innkeepers, common carriers, mechanics, and other manual laborers receiving property for the purpose of repairing or improving that property.[27] Statutory liens, by contrast, expressly create a property right in favor of a creditor regardless of whether such a lien existed at

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* Such discounts include AAA, AARP, etc.

20. Interview with Marcia Augsburger, *supra* note 14; *see, e.g.*, Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148, 158–59 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (2003).

21. *Id.* at 158–59. One such method of encouragement is allow lower deductibles and other costs for members using "preferred provider" hospitals. *Id.* at 158 n.4.

22. *See, e.g.*, *id.* at 158–59.

23. CAL. CIV. CODE § 2872 (West 1993); 4 B.E. WITKIN, SUMMARY OF CAL. LAW, PERS. PROP. § 168 (9th ed. 1987).

24. *See* BLACK'S LAW DICTIONARY 933 (7th ed. 1999). *See generally* 51 AM. JUR. 2D *Liens* § 1 (2000).

25. *See* BLACK'S LAW DICTIONARY 933–35 (7th ed. 1999).

26. Meta Calder, *Florida's Hospital Lien Laws*, 21 FLA. ST. U. L. REV. 341, 343 (1993).

27. *Id.*

common law or if a contract existed between the parties.[28] All hospital liens are necessarily statutory liens because no such right existed at common law.[29]

C. THE CALIFORNIA HOSPITAL LIEN ACT

During the Great Depression Era of the 1930s, state legislatures throughout the country began to enact hospital lien statutes to mitigate the losses incurred when hospitals treated insolvent patients.[30] By 1939, approximately twenty-five states had hospital lien statutes.[31] While the details of these statutes are beyond the scope of this Note, the mere fact that such a large number of states enacted them within a relatively short period of time indicates a serious legislative concern for protecting hospitals and other medical care providers from insolvent patients.

The California legislature enacted the original HLA in 1961, codified at California Civil Code sections 3045.1 through 3045.6.[32] The original HLA established a hospital's right to a statutory lien[33] for the reasonable value of emergency services to parties.[34] The purpose of the original HLA[35] was "to secure part of the patient's recovery from liable third persons to pay his or her hospital bill, while ensuring that the patient retained sufficient funds to address other losses resulting from tortious injury."[36] The California legislature intended for financially able persons to pay their medical bills, while providing protection for needy

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28. A statutory lien is a "lien arising solely by force of statute, not by agreement of the parties." BLACK'S LAW DICTIONARY 935 (7th ed. 1999).

29. J.F. Rydstrom, Annotation, *Construction, Operation, and Effect of Statute Giving Hospital Lien Against Recovery from Tortfeasor Causing Patient's Injuries*, 25 A.L.R. 3d 858, 862 (1969).

30. Calder, *supra* note 26, at 351–52.

31. *Id.* at 352.

32. Swanson v. St. John's Reg'l Med. Ctr., 118 Cal. Rptr. 2d 325, 328–29 (Cal. Ct. App. 2002).

33. *See* CAL. CIV. CODE § 3045.1 (West 1993).

34. CAL. CIV. CODE § 3045.1 (Deering 1961) (amended 1992).

35. Former section 3045.1 provided that a hospital which

> furnishes emergency medical or other services of a reasonable value in excess of one hundred dollars ($100) to any person injured by reason of an accident or wrongful act not covered by [workers' compensation]... shall, if the person asserts or maintains a claim against another for damages on account of his injuries, have alien upon the damages in excess of one hundred dollars ($100) recovered, or to be recovered, by the person,... to the extent of the amount of the reasonable and necessary charges of the hospital for the treatment, care, and maintenance of the person in the hospital during the emergency period.

Id.

36. Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos., 932 P.2d 210, 212 (Cal. 1997). A committee report prepared in conjunction with the 1992 amendments provides that

> hospitals, including those that operate trauma centers, treat accident victims, many of whom are uninsured. Many hospitals have problems keeping their emergency rooms open because a large proportion of accident victims are uninsured. The purpose of this bill is to make it possible for hospitals to seek payment, particularly from insurance companies whose clients have accidentally or negligently hurt another person....

Assemb. Comm. on Judiciary, Rep. on Assemb. B. No. 2733, 1991–1992 Reg. Sess., at 2 (Cal. 1992) (as amended May 6, 1992).

patients from medical bills "so burdensome as to pauperize [him] or his family."[37]

In 1992, the California legislature amended the HLA to its current form.[38] The current version of the HLA gives medical care providers the right to place a statutory lien on a patient's judgment "to the extent of the amount of the reasonable and necessary charges of the hospital."[39] A HLA lien applies "whether the damages are recovered, or are to be recovered, by judgment, settlement, or compromise."[40] The 1992 amendment also sets forth the notice requirements that a medical care provider must meet to properly hold a HLA lien.[41] Finally, the 1992 version of the HLA provides the method for paying the lien by a third-party tortfeasor to the medical care provider and limits the amount a hospital may recover by HLA lien.[42]

II. INTERPRETATION OF THE HOSPITAL LIEN ACT BY CALIFORNIA COURTS

The California Supreme Court stated in 1997 that the HLA has been the subject of "scant interpretation" by courts since its enactment.[43] Since the HLA's amendment in 1992, a relatively small number of published cases have addressed the HLA and liens levied against a patient's

37. *Mercy Hosp.*, 932 P.2d at 212 (quoting Margaret Greenfield, *Property Liens for County Hospital Care—A Collection Tool*, 8 LEGIS. PROBS. 3 (1961)). Apparently the California Hospital Association's membership survey revealed that the average hospital lost at least $90,000 as a result of injured persons collecting a judgment or settlement and failing to discharge any portion of the hospital bill. *Id.* at 215.

38. The amendment of sections 3045.1, 3045.3, and 3045.4 expanded "the lien's scope to include 'emergency and ongoing medical or other services' and deleted the $100 floor." *Id.* at 218 n.3.

39. CAL. CIV. CODE § 3045.1 (West 1993). Section 3045.1 states in pertinent part:

> Every . . . institution or body maintaining a hospital licensed under the laws of this state which furnishes emergency and ongoing medical or other services to any person injured by reason of an accident or negligent or other wrongful act . . . shall, if the person has a claim against another for damages on account of his or her injuries, have a lien upon the damages recovered . . . by the person . . . to the extent of the amount of the reasonable and necessary charges of the hospital.

CAL. CIV. CODE § 3045.1. The lien applies to any damages "recovered, or . . . to be recovered, by judgment, settlement, or compromise." *Id.* § 3045.2.

40. *Id.*

41. *Id.* § 3045.3. The notice requirement of section 3045.3 goes beyond the scope of this Note.

42. Section 3045.4 provides in pertinent part that

> [a]ny person, firm, or corporation, including . . . insurance carrier[s], making any payment to the injured person . . . for the injuries he or she sustained . . . without paying [the medical care provider] . . . the amount of its lien claimed in the notice, or so much thereof as can be satisfied out of 50 percent of the moneys due under any final judgment . . . shall be liable to the [medical care provider] . . . for the amount of its lien claimed in the notice which the hospital was entitled to receive as payment for the medical care and services rendered to the injured person.

Id. § 3045.4. The "hospital may, at any time within one year after the date of the payment to the injured person . . . enforce its lien by filing an action at law against the person . . . making the payment and to whom" the notice was given. *Id.* § 3045.5.

43. Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos., 932 P.2d 210, 213 (Cal. 1997).

recovery.[44] At issue in *Mercy Hospital and Medical Center v. Farmers Insurance Group of Companies* was the applicability of California Civil Code section 3045.4 (limiting the amount of HLA lien liability)[45] on a tortfeasor's insurance company who failed to pay to a hospital at the time of judgment.[46] However, the California Supreme Court did not consider the issue of balance billing in *Mercy Hospital* or any subsequent case. Instead, the California Courts of Appeal have adopted two opposing theories regarding the validity of balance billing.

A. *NISHIHAMA V. CITY AND COUNTY OF SAN FRANCISCO*

In *Nishihama v. City and County of San Francisco*, the California Court of Appeal for the First District was squarely confronted with the issue of whether a hospital could use the HLA to recover a portion or all of the difference between its discount and customary rates from a patient.[47] The *Nishihama* court held that a medical care provider asserting a HLA lien may only recover up to the contractual rates agreed upon with the health insurance carrier for the type of service rendered to the insured patient.[48] Since the hospital in *Nishihama* had been paid its full discounted rates by the health insurance carrier, it had no HLA lien rights to any damages awarded to the patient regardless of the amount of its customary rates.[49] The court dismissed the hospital's contention that the phrase "reasonable and necessary charges" in section 3045.1 (giving the medical care provider the right to place a HLA lien on a patient's judgment) could mean the hospital's customary rates.[50] Instead, the court said, the phrase "reasonable and necessary" is tied to the amount actually charged to the injured patient's insurance company, or the hospital's discounted rates.[51]

In *Nishihama*, the court reasoned that any lien rights of the medical care provider are necessarily defined by any contracts between it and a patient's health insurance carrier.[52] The court interpreted section 3045.4 to limit a HLA lien to any discounted rates agreed upon between the medical care provider and a health insurance carrier.[53] Thus, the court

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44. *See, e.g.*, Swanson v. St. John's Reg'l Med. Ctr., 118 Cal. Rptr. 2d 325 (Cal. Ct. App. 2002); Nishihama v. City & County of San Francisco, 112 Cal. Rptr. 2d 861 (Cal. Ct. App. 2001); Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (Cal. 2003).

45. *See supra* note 42.

46. *Mercy Hosp.*, 932 P.2d at 211.

47. Nishihama v. City & County of San Francisco, 112 Cal. Rptr. 2d 861, 866–67 (Cal. Ct. App. 2001).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. "The amount that a hospital is entitled to receive as payment necessarily turns on any

held that balance billing for a portion of the difference between a hospital's discount and customary rates is prohibited by California law and a medical care provider may not recover more than its discounted rates by HLA lien.[54]

B. *Swanson v. St. John's Regional Medical Center*

The California Court of Appeal for the Second District revisited the same issue presented in the *Nishihama* case a year later in *Swanson v. St. John's Regional Medical Center*.[55] The *Swanson* court, however, reached an opposite conclusion. There, the court held that the payment of discounted charges by the patient's health insurance carrier does not extinguish the hospital's statutory lien.[56] The court relied on a textual interpretation of the HLA, stating that in statutory construction "'the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted.'"[57] The *Swanson* court concluded that because medical care providers may assert HLA liens "'to the extent of the amount of the reasonable and necessary charges of the hospital . . . for the treatment, care, and maintenance' of a patient injured by a tortfeasor," the HLA authorizes balance billing.[58]

The *Swanson* court's holding relied on two central premises, citing the *Mercy Hospital* decision as support for each.[59] First, the *Swanson* court held that a HLA lien "is a statutory lien and does not require that the patient owe the hospital a debt."[60] The court implicitly rejected the requirement that a lien merely secures the "payment of an underlying debt or obligation."[61] Second, the court reasoned that the hospital lien under the HLA "is not a charge against the patient. To the contrary, it is a 'statutory medical lien in favor of a hospital against third persons liable for the patient's injuries.'"[62] Citing these propositions, the *Swanson* court concluded that it was bound by the *Mercy Hospital* decision to allow balance billing.[63] The court also examined the legislative intent, explaining that "because the [California state] legislature has determined

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agreement it has with the injured person or the injured person's health insurance carrier." *Id.*

54. *Id.* at 867–68.

55. 118 Cal. Rptr. 2d 325 (Cal. Ct. App. 2002).

56. *Id.* at 329–30.

57. *Id.* at 327 (quoting CAL. CIV. PROC. § 1858 (West 1993); Lazar v. Hertz Corp, 82 Cal. Rptr. 2d 368, 374 (Cal. Ct. App. 1999)).

58. *Id.* (quoting CAL. CIV. CODE § 3045.1 (West 1993)).

59. Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148, 155 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (2003).

60. *Swanson*, 118 Cal. Rptr. 2d at 328 (citing Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos., 932 P.2d 210, 211 (Cal. 1997)).

61. *Parnell*, 131 Cal. Rptr. 2d at 154 (discussing the *Swanson* decision).

62. *Swanson*, 118 Cal. Rptr. 2d at 329 (quoting from *Mercy Hospital.*, 932 P.2d at 211).

63. *Id.* at 330.

that hospital liens are exempt from balance billing *limits*, we may not override that determination."[64] Not surprisingly, hospitals and other medical care providers have relied on the *Swanson* case to justify their practice of balance billing under the HLA.[65] The unreasonableness of relying on the *Swanson* court's logic will be discussed in Section III.

D. Application of the *Nishihama* and *Swanson* Decisions to the Parnell Scenario

In *Mercy Hospital and Medical Center v. Farmers Insurance Group of Companies*, the California Supreme Court considered whether the tortfeasor's insurance company, who distributed settlement proceeds without paying the HLA lien, remained liable for the entire amount of lien or only for the limited (50%) portion it should have paid to the hospital.[66] The court began by defining the word "lien"[67] and identified HLA liens as "statutory nonpossessory liens."[68] Statutory nonpossessory liens are generally nonconsensual liens and are typically enacted "to compensate a person who [has], pursuant to express or implied contract, furnishe[d] services."[69] The court interpreted the "amount of [its] lien claimed in the notice which the hospital was entitled to receive," specified in section 3045.4, to be written in the past tense.[70] Accordingly, the court held that the language referred back to the amount that the hospital was entitled to receive at the time of judgment dispersion, and so limited the hospital's recovery to the lesser of: (1) 50 percent of the judgment, or (2) the amount stated in the lien notice.[71] Therefore, a HLA lien holder may recover a maximum of 50 percent of any judgment amount paid by a third-party tortfeasor under section 3045.4.[72]

1. *Application of the* Nishihama *Decision*

Under the *Nishihama* court's reasoning, the Parnell Scenario described in the introduction would be resolved in a manner more favorable to Joel Parnell. San Joaquin Community Hospital's HLA lien would be limited to a maximum of $100,000 (the discounted rate actually paid by the health insurance carrier), instead of the $130,000 demanded in the lien notice (the difference between the discounted and customary rates). However, the 50 percent HLA limitation of section 3045.4 would

64. *Id.* (emphasis added).

65. *See, e.g.*, Brourman v. Tenet Healthsystem Hosps., Inc., No. B152586, 2002 WL 31517947, at *6 (Cal. Ct. App. Nov. 12, 2002); *see also* Whiteside v. Tenet Healthcare Corp., 124 Cal. Rptr. 2d 580, 584 (Cal. Ct. App. 2002).

66. 932 P.2d 212–13 (Cal. 1997).

67. *Supra* note 23.

68. *Mercy Hosp.*, 932 P.2d at 211.

69. Witkin, *supra* note 23, at § 168.

70. *Mercy Hosp.*, 932 P.2d at 213–14 (quoting Cal. Civ. Code § 168 (West 1993)).

71. *Id.*

72. *Id.*

still apply. Under the *Mercy Hospital* court's interpretation of section 3045.4, San Joaquin may recover the lesser of 50 percent of the judgment or the amount stated in the lien notice.[73] Because 50 percent of the hypothetical recovered judgment ($125,000) is less than the amount stated in the lien notice ($130,000), San Joaquin's maximum recovery initially appears to be $125,000. However, a medical care provider cannot recover more than contractually negotiated discounted rates under the *Nishihama* court's interpretation of the HLA. Therefore, under the *Nishihama* decision, San Joaquin's HLA lien recovery is limited to the discounted rates it has with Parnell's insurance carrier, or $100,000. The following table illustrates the resolution of the Parnell Scenario under the *Nishihama* court's reasoning:

Nishihama Decision	
50% of Judgment	$125,000
Amount Stated in HLA Lien Notice	$130,000
Lesser of 50% of Judgment or Amount Stated in HLA Lien Notice	$125,000
Maximum Recovery Allowed by Case	$100,000 (limited by discounted rates)
Amount Recoverable	$100,000

2. *Application of the* Swanson *Court Decision*

Pursuant to the *Swanson* court's interpretation of the HLA, the Parnell Scenario described in the introduction is resolved very differently and is more favorable to the medical care provider. San Joaquin Community Hospital may now attempt to recover a portion of the difference between its negotiated discounted rates with Parnell's insurance carrier and its customary rates despite any accusations of balance billing by Parnell. Section 3045.4's 50 percent limitation on the HLA lien amount still applies, but pursuant to the *Swanson* decision, San Joaquin may recover up to the amount of its customary charges or a maximum of $230,000. Again, pursuant to the *Mercy Hospital* court's interpretation of section 3045.4, San Joaquin may recover the lesser of 50 percent of the recovered judgment or the amount stated in the lien notice.[74] Because 50 percent of the judgment ($125,000) is less than the amount stated in the lien notice ($130,000), San Joaquin's maximum recovery again appears to be $125,000. However, a medical care provider may recover by HLA lien an amount up to its customary charges and is not limited by its discounted rates under the *Swanson* court's interpretation of the HLA. Accordingly, San Joaquin may recover (and

73. *Mercy Hosp.*, 932 P.2d at 213.
74. *Id.*; CAL. CIV. CODE § 3045.4 (West 1993).

Parnell must pay) $125,000, or $25,000 more under the *Swanson* decision than the amount calculated pursuant to the *Nishihama* decision. Another table illustrates the resolution of the Parnell Scenario under the *Swanson* court's reasoning:

Swanson Decision	
50% of Judgment	$125,000
Amount Stated in HLA Lien Notice	$130,000
Lesser of 50% of Judgment or Amount Stated in HLA Lien Notice	$125,000
Maximum Recovery Allowed by Case	$150,000 (limited by customary rates)
Amount Recoverable	$125,000

III. PROPOSAL

A. CALIFORNIA COURTS SHOULD FOLLOW THE *NISHIHAMA* DECISION

The broadly defined purpose of the HLA is to ensure hospital payment from patients injured by third-party tortfeasors, while making certain that the patients retain sufficient resources to cover their other costs.[75] The *Nishihama* court's interpretation of the HLA[76] best serves the legislature's purpose while providing adequate assurance that hospitals will recover at least a part of their costs. Although the *Swanson* court's interpretation of the HLA authorizes balance billing based on a hospital's customary rates,[77] numerous arguments indicate that the *Nishihama* court's interpretation of the HLA is a more reasoned and equitable solution. That court's interpretation of the HLA is a better one because: (1) the interpretation recognizes the parties' freedom to contract; (2) medical care providers seeking to recover the difference between their discounted and customary rates have no independent cause of action against the patient; (3) the legislative history of the HLA does not contemplate or mention balance billing; (4) public policy dictates against the *Swanson* court's interpretation; and (5) cases interpreting similar statutes similar to the HLA have comported with the *Nishihama* court's interpretation.

1. *Contractual Freedom*

The *Nishihama* court's interpretation of the HLA favors the freedom of parties to contract for the costs of medical care. The court

75. *Mercy Hosp.*, 932 P.2d at 212.

76. The Fifth Appellate District came to the same conclusion in *Parnell v. Adventist Health System/West*, which was depublished after the California Supreme Court grated certiorari. 131 Cal. Rptr. 2d 148, 155 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (Cal. 2003).

77. *Swanson*, 118 Cal. Rptr. 2d at 329–30.

stated "[t]he amount that a hospital is entitled to receive as payment necessarily turns on any agreement it has with the . . . injured person's insurer."[78] Both state and federal courts have traditionally favored parties' contractual freedom.[79] Health insurance carriers and other insurers have specifically negotiated their rates so that medical care providers will accept them as payment in full for their services. Allowing a medical care provider to base its lien recovery on amorphous customary charges, rather than specifically negotiated discount rates, effectively provides an "end round" of the contract between the parties. This result undermines party expectations of contractual enforceability.

Balance billing allows a hospital to recover more than what it has specifically bargained for with a health insurance carrier. It also forces a patient to absorb the additional costs of medical care when he or she has obtained health insurance for the very purpose of avoiding high medical care costs. In the *Nishihama* decision, for example, California Pacific Medical Center ("CPMC") agreed with the patient's health insurance carrier to provide necessary health services for $3,600 and would accept that amount as payment in full.[80] CPMC subsequently demanded its customary rates of $17,168 from the patient with a HLA lien.[81] The court held that HLA lien rights do not extend beyond the contracted amount a hospital agrees to receive from a health insurance carrier as payment in full for health care services.[82] Implied in its holding is the court's recognition of: (1) both parties' freedom to contract, and (2) the concept that specifically negotiated rates should be binding on the parties who have bargained and/or relied on them.[83] Consequently, the courts' great respect for the freedom to contract[84] dictates that California courts follow the *Nishihama* decision.

2. *No Independent Cause of Action Against Patients*

In addition to contractual concerns, the *Nishihama* court recognized that a medical care provider seeking to recover the difference between its discounted and customary rates under the HLA has no independent cause of action against its patients.[85] The court cited *Grauberger v. St.*

78. Nishihama v. City & County of San Francisco, 112 Cal. Rptr. 2d 861, 867 (Cal. Ct. App. 2001).

79. *See, e.g.*, Smiley v. Kansas, 196 U.S. 447, 456 (1905).

80. *Nishihama*, 112 Cal. Rptr. 2d at 866.

81. *Id.* at 866–67.

82. *Id.* at 867.

83. *See id.* at 867–68.

84. *Smiley*, 196 U.S. at 456.

85. *Nishihama*, 112 Cal. Rptr. 2d at 868. While the legislative history to California Civil Code section 3040 indicates that the HLA gives an independent right to assert a lien, the lien right is not against the patient. *Analysis of S.B. 1471: Health Care Liens*, S. Judiciary Comm., 1999–2000 Reg. Sess. 4–5 (Cal. 2000) (as amended April 27, 2000), *available at* http://leginfo.public.ca.gov/pub/99-00/bill/sen/sb_1451-1500/sb_1471_cfa_20000503_084010_sen_comm.html (last visited Nov. 10, 2004).

Francis Hospital[86] as persuasive authority for a medical care provider's lack of an independent cause of action against its patients. In *Grauberger*, the defendant hospital contended that the HLA conferred an independent right to recover payment from the third-party tortfeasor.[87] The district court for the Northern District of California did not agree. First, the court reasoned that "the language of the HLA does not give hospitals a *cause of action*; it only allows hospitals to place a *lien* on the *patient's* cause of action."[88] Second, the *Grauberger* court determined that the phrase "reasonable and necessary charges"[89] in the HLA did not give the hospital a cause of action against the patient.[90] Rather, the court determined that "reasonable and necessary charges" are charges made to the patient, and in the absence of a right to be paid for the charges, a hospital has no "amount" to seek from judgment proceeds against a third-party tortfeasor.[91]

The California Supreme Court has also recognized that a hospital's right to payment is derivative of the patients, albeit in a different context.[92] In *Mercy Hospital*, the California Supreme Court held a hospital's lien rights against a tortfeasor's insurer to be dependent on the amount the patient was entitled to recover from that insurer.[93] Thus, the hospital's statutory lien rights were not independent, but were instead derivative of, and dependent on, the rights of the patient.[94]

Without an independent cause of action against the patient, it is difficult to reason that a medical care provider may recover beyond its contractual discounted rates. Standing alone, a medical care provider would only have a cause of action against the health insurance carrier, and in that situation would be limited to a breach of contract cause of action for failure to pay the discounted rates. Allowing a medical care provider to recover damages beyond a breach of contract claim would create another "end round" of the contractual discounted rates and a windfall for the medical care provider at the expense of its patients.

3. *Legislative History and Intent*

The legislative history of the original HLA lacks any mention of balance billing concerns. There is also no indication that the legislature even considered that HLA liens could be used to recover the difference between insurance payments for medical services and a medical care

86. 149 F. Supp. 2d 1186 (N.D. Cal. 2001).
87. *Id.* at 1188.
88. *Id.* at 1191.
89. *See* CAL. CIV. CODE § 3045.1 (1961).
90. *Grauberger*, 149 F. Supp. 2d at 1191.
91. *Id.*
92. Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos., 932 P.2d 210, 211 (Cal. 1997).
93. *Id.*
94. *Id.*

provider's "usual and customary charges."[95] The likely culprit for this lack of legislative history is the dramatic change in the medical insurance industry since the enactment of the original HLA. In 1961, the negligible gap between discounted rates and customary rates did not concern medical care providers or the legislature.[96] As a result, it is likely that the legislature did not contemplate the HLA's impact in the context of balance billing. The purpose of the original HLA as stated in the available legislative history was "to secure part of the patient's recovery from liable third persons to pay his or her hospital bill, while ensuring that the patient retained sufficient funds to address other losses resulting from tortious injury."[97] Based on this statutory purpose, it is unlikely that the legislature intended to rewrite California's law of accord and satisfaction[98] to permit a balance billing scheme via the HLA.[99]

Whether a medical care provider contracts for discounted rates or simply accepts discounted rates from a health insurance carrier, it is the medical care provider's prerogative to accept or refuse the rates offered by the insurer.[100] In either situation, there is nothing in the statute or its legislative history relieving a medical care provider of its choice to provide services at a price other than its customary rates.[101] Thus, the silence of the legislative history and the purpose of the HLA indicate that the *Nishihama* court's interpretation of the statute best applies the intent of the California legislature.

4. *Public Policy*

Requiring an uninsured patient who has received medical care to pay up to half of his or her recovery[102] to the medical care provider seems fair and equitable. Such a patient has benefited at the expense of the medical care provider. However, a patient who has specifically purchased health insurance to pay for medical expenses at some point in the future is distinguishable from an uninsured patient who receives medical care. In the latter situation, the matters of fairness and equity become murky. Such a patient has likely purchased medical insurance for the sole reason of limiting exposure to medical costs to the deductibles or co-payments required by his or her insurance policy.[103] Forcing a fully insured patient to pay additional amounts to cover customary charges, despite having

95. *See* Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148, 152–53 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (Cal. 2003).

96. *Cf.* Calder, *supra* note 26 at 367–68.

97. *Supra* note 36 and accompanying text (discussing the original purpose of the HLA).

98. *See* CAL. CIV. CODE §§ 1521–1523 (West 1982).

99. *Parnell*, 131 Cal. Rptr. 2d at 158.

100. *Id.*

101. *Id.*

102. *See* CAL. CIV. CODE § 3045.4 (West 1993) (limiting the amount of HLA lien liability).

103. *See Parnell*, 131 Cal. Rptr. 2d at 152.

adequate health insurance purchased specifically for this purpose, is unfair and inequitable.

In the circumstances described above, a windfall may be created for at least one of the parties.[104] If an insured patient's medical insurance is sufficient to pay the discounted rates, the insured patient who recovers from a tortfeasor any additional amounts for medical costs in a lawsuit may be perceived as receiving a windfall.[105] This patient made insurance payments to cover discounted rates, but has recovered more despite having received in effect pre-paid medical care.[106] However, a medical care provider receiving both its contractual discounted rates as well as its customary charges from a patient's judgment recovery has similarly received a windfall. The medical care provider has in effect received more than the amount for which it specifically contracted with the health insurance carrier.

It is the medical care provider who is often better able to absorb financial "loss" as a result of the medical care services provided.[107] In other words, a medical care provider can better bear the loss of medical care services under the cost/benefit economic model. Modern hospitals are often part of a larger corporate or non-corporate conglomerate of hospitals and medical care providers.[108] Medical care providers are likely to have a much larger pool of resources than an individual patient and are able to absorb high medical care costs. While the medical care provider is essentially innocent,[109] the patient has already suffered through his or her injuries and the resulting lawsuit against the third-party tortfeasor. Such a patient should not also be forced bear additional medical costs. Taking the cost/benefit economic model, together with the purpose of the HLA,[110] the balance billing costs of medical care should be borne by medical care providers instead of patients.

5. *Similar Federal Statutes Disallow Recovery of Customary Charges*

Other statutes similar to the HLA do not allow medical care providers to collect their full and customary charges and limit providers to agreed-upon discounted rates. For instance, federal Medicaid law does not allow Medicaid providers to recover their full and customary charges

104. *See, e.g.*, Hanif v. Hous. Auth., 246 Cal. Rptr. 192, 195 (Cal. Ct. App. 1988) (considering whether an injured plaintiff may recover more than the amount paid for medical care).

105. *Parnell*, 131 Cal. Rptr. 2d at 153.

106. The issue of whether jury awards are actually delineated into separate categories such as medical costs, pain and suffering, etc. is beyond the scope of this Note.

107. Such as receiving the lower discounted rates as opposed to customary rates.

108. *See, e.g.*, Nishihama v. City & County of San Francisco, 112 Cal. Rptr. 2d 861, 866 (Cal. Ct. App. 2001) (stating that California Pacific Medical Center is an affiliate of Sutter Health).

109. *See* Olszewski v. Scripps Health, 69 P.3d 927, 942–43 (Cal. 2003).

110. *See supra* notes 35–36.

via statutory lien.[111] In *Olszewski v. Scripps Health*, the California Supreme Court recognized that the California Medical Assistance Program ("Medi-Cal")[112] allows a medical care provider to recover its full customary rates for services by lien.[113] A medical care provider, after refunding a Medi-Cal payment, may recover its customary rates from a Medi-Cal beneficiary's recovery from a responsible third-party tortfeasor under state law.[114] However, the *Olszewski* court held that federal law preempted the Medi-Cal lien statutes at issue.[115] Medicaid statutes and regulations are "unambiguous and limit provider collections from a Medicaid beneficiary to, at most, the cost-sharing charges allowed under the state plan, even when a third-party tortfeasor is later found liable for the injuries suffered by that beneficiary."[116]

By finding that federal Medicaid law preempted the Medi-Cal liens at issue in *Olszewski*, the California Supreme Court implicitly agreed with Congress that a medical care provider should not be able to recover any portion of the difference between its discounted and customary rates. Consequently, because federal law similar to the HLA allows medical care providers to recover only their discounted rates by statutory lien, California courts should follow the *Nishihama* court's interpretation of the HLA.

B. CRITIQUE OF THE *SWANSON* DECISION

The *Swanson* court's interpretation of the HLA is problematic and should not be followed by other California courts because: (1) the court improperly interpreted and misapplied the *Mercy Hospital* decision; (2) the court makes an improper interpretation of "reasonable and necessary charges" as described by the HLA; and (3) its reliance on the legislative history of California Civil Code section 3040 (governing balance billing in the context of contract liens of HMOs[117]) is misplaced.

1. *The* Swanson *Case Improperly Interpreted and Misapplied the* Mercy Hospital *Holding*

The *Swanson* court relied on two central premises to determine that a medical care provider may recover a portion of the difference between

111. *Olszewski*, 69 P.3d at 941–42.

112. Medi-Cal is the California equivalent of the federal Medicaid program.

113. *Id.* at 942.

114. *Id.* The *Olszewski* court noted that California's Medi-Cal law allows a medical care provider to recover a greater amount by lien than otherwise allowed under the state plan. *Id.*

115. *Id.* at 946.

116. *Id.* at 942. The *Olszewski* court also stated in dicta that by invalidating Medi-Cal law by preemption, it gave the third-party tortfeasor a windfall at the expense of the "innocent medical care provider." *Id.* at 947. The court urged the California legislature to remedy the situation in a manner consistent with federal law. *Id.*

117. Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148, 155–56 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (Cal. 2003).

its discounted and customary rates by HLA lien.[118] The court cited the *Mercy Hospital* decision for both assertions.[119] The *Swanson* court's reliance on the *Mercy Hospital* decision is misplaced. First, the *Swanson* court determined the HLA to be a statutory lien creating an independent lien right on behalf of the medical care provider that does not require the patient to be a debtor of the medical care provider.[120] For this proposition, the *Swanson* court likely relied on the following language from *Mercy Hospital*: "Whatever principles might generally apply to liens, former section 3045.4 is a statutory, not a common law, lien. The legislature is, of course, free to define and limit such a lien, and has done so in this case."[121] Contrary to the court's suggestion, this passage did not refer to a "legislative expansion" of common law liens by making hospital liens independent from any underlying patient debt.[122] Rather, when read in context, the limitation cited by the California Supreme Court in *Mercy Hospital* referred to the 50 percent limitation on HLA liens of section 3045.4.[123] Therefore, the *Swanson* court's contention that the *Mercy Hospital* holding creates an independent right against patients is unsupported by the text of the statute.

The second premise from *Mercy Hospital* relied upon by the *Swanson* court is that HLA liens are not charges against the patient.[124] Instead, the *Swanson* court concluded, the HLA conveys a lien right in favor of the medical care provider against *third-party tortfeasors*.[125] As authority for this proposition, the *Swanson* court again quoted the *Mercy Hospital* court, stating that a hospital lien is a "'statutory medical lien in favor of a hospital against third persons liable for the patient's injuries.'"[126] However, the *Swanson* opinion failed to include the passage immediately preceding the quote from the *Mercy Hospital* case, which states:

> Here, of course, we address the parameters of a [HLA] lien that compensates a [medical care provider] for providing medical services to an injured person by giving the [medical care provider] *a direct right to a certain percentage of specific property*, i.e., a judgment, compromise, or settlement, otherwise *accruing to that person*.[127]

The *Swanson* court misconstrued the passage by reading it out of context. Read in context, the two passages from the *Mercy Hospital*

118. Swanson v. St. John's Reg'l Med. Ctr., 118 Cal. Rptr. 2d 325, 328–29 (Cal. Ct. App. 2002).
119. *Id.*
120. *Id.* at 328.
121. Mercy Hosp. & Med. Ctr. v. Farmers Ins. Group of Cos., 932 P.2d 210, 215 (Cal. 1997).
122. *Parnell*, 131 Cal. Rptr. 2d at 155.
123. *Id.*
124. *Swanson*, 118 Cal. Rptr. 2d at 329.
125. *Id.*
126. *Id.* (quoting *Mercy Hosp.*, 932 P.2d at 211).
127. *Mercy Hosp.*, 932 P.2d at 211 (emphasis added).

decision recognize that HLA liens attached to property "otherwise" belonging to the patient. Despite the lien attaching to the property while it is controlled by the third-party tortfeasor or insurer, the lien only attaches because of the patient's underlying property right.[128] Without such a right to judgment, there would be no property on which the HLA lien could attach.[129] Thus, the *Mercy Hospital* decision held that the lien acts as a charge against a patient's property interest and is actually a charge by the medical care provider against the patient. The *Swanson* court misinterpreted *Mercy Hospital* and therefore misstates and misconstrues the leading case authority on the HLA to favor balance billing. Accordingly, the *Swanson* decision's improper interpretation of the HLA should not be followed by other California courts.

2. *The* Swanson *Case's Textual Argument*

The *Swanson* court also based its decision to allow balance billing on a textual interpretation of the HLA.[130] The court interpreted the phrase "reasonable and necessary charges," as described in section 3045.1 (giving the medical care provider the right to place a HLA lien on a patient's judgment), to be equivalent to a medical care provider's customary rates.[131] As a result, the *Swanson* court concluded that the language of the HLA authorizes a medical care provider to recover the difference between its discounted and customary rates from a patient's tort recovery.[132]

The phrase "reasonable and necessary charges" is not defined in the HLA, nor does the phrase have a specific trade usage meaning in the health care industry.[133] Instead, the traditional industry terminology for a medical care provider's customary rates is "usual and customary charges" or "reasonable and customary charges."[134] The traditional formulation for the *actual medical services provided* by a medical care provider (i.e., services the provider deems required for the patient's well-being) is "medically necessary" or "reasonable and necessary" services.[135]

At first glance, the phrase "reasonable and *customary* charges" is similar to the HLA's "reasonable and *necessary* charges" language. In legal terminology, however, the phrases stand for very different propositions. In *Parnell*, the court scrutinized the phrase "reasonable and necessary charges" in relation to a medical care provider's customary

128. *Parnell*, 131 Cal. Rptr. 2d at 156.
129. *See id.*
130. *Swanson*, 118 Cal. Rptr. 2d at 328–30.
131. *See id.* at 329.
132. *Id.* at 329–30.
133. *Parnell*, 131 Cal. Rptr. 2d at 156.
134. *See, e.g.*, Van Ness v. Blue Cross of Cal., 104 Cal. Rptr. 2d 511, 513 (Cal. Ct. App. 2001).
135. *See, e.g.*, County of San Diego v. State, 931 P.2d 312, 335 (Cal. 1997).

rates.[136] *Parnell* involved an insured patient who was injured as a passenger in a taxicab.[137] The patient received hospital care from the defendant medical care provider, and the defendant charged the patient's health insurance carrier its contractual discounted rates.[138] The *Parnell* court proposed that charges which are "usual and customary" *may* be equivalent to "reasonable" charges.[139] However, the *Parnell* court warned, "one might wonder about the use of 'necessary' to further describe the 'reasonable' charges."[140] In other words, under a plain-language reading of the HLA, balance billing for the difference between discounted and customary rates is not "necessary" in any ordinary sense of the word.[141] Customary rates are not "necessary" for a patient to obtain services from the medical care provider, since the patient has an existing contractual right to such services through the health insurance carrier.[142] Further, this contractual right typically requires the medical care supplier to provide its services at the negotiated discount rates as payment in full for the services.[143] Neither is balance billing "necessary" for a medical care provider to recover its costs of providing medical care services. The medical care provider has specifically negotiated discount rates with the health insurance carrier, presumably in contemplation of the actual costs involved in providing those services to a patient.[144] Therefore, reasonable and necessary charges as used in by the California legislature in the HLA are not equivalent to a medical care provider's customary rates according to the *Parnell* decision.

The *Parnell* court's interpretation of this statutory phrase is sound. "Reasonable and necessary charges" is not synonymous with a medical care provider's customary rates. If the legislature had intended for the HLA to allow the recovery of a medical care provider's customary rates it would have used the traditional health care industry formulation of "usual and customary charges." It is plausible to assume that the legislature would have used an industry specific term if it meant to describe a medical care provider's customary rates. While "usual and customary" could potentially be equated with "reasonable" charges, use of the word "necessary" indicates a different motive by the legislature. "Necessary charges" instead refers to the charges a medical care provider decides are required for a patient's well-being. Balance billing charges

136. 131 Cal. Rptr. 2d at 156–57.

137. *Id.* at 150.

138. *Id.*

139. *Id.* at 157.

140. *Id.*

141. "Necessary" is defined as something "that cannot be done without . . . [or is] absolutely required." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1510–11 (3d ed. 1993).

142. *Parnell*, 131 Cal. Rptr. 2d at 157.

143. *Id.*

144. A "reasonable hospital" would not contract for rates lower than its actual costs.

are not "necessary" in any ordinary use of the word, in the context of a patient's receipt of medical service or a medical care provider's attempt to recover its costs. Accordingly, California courts should use the *Parnell* court's determination of the phrase "reasonable and necessary charges" as not equivalent to a medical care provider's customary rates and disallow balance billing.

3. *The Legislative History of California Civil Code Section 3040*

The plaintiff in *Swanson* argued that HLA liens are invalid whenever the lien amount exceeds the discounted rates paid by a patient's medical insurer.[145] The *Swanson* court dismissed this argument, citing the legislative history of California Civil Code section 3040.[146] Section 3040 imposes a limit on an HMO's ability to recover the difference between its discounted and customary rates when the HMO pays a negotiated discount rate for patient treatment.[147] The court took section 3040's legislative history as evidence that the California state legislature specifically exempted HLA liens from balance billing limits and by implication allowed a medical care provider to recover the difference between its customary and discounted rates.[148] The Judicial Committee analysis of section 3040 states that "[section 3040] does not intend to limit [medical care provider] liens now available under California Civil Code section 3045.1."[149]

Rather than a license to recover additional charges by HLA lien, the statement quoted above is instead equivalent to *obiter dictum*[150] in a judicial opinion. The statement is bare; the committee cited no authority for its claim nor did it elaborate as to the effects it would have on the HLA. It is also irrelevant to the discussion of the actual purpose of the bill before the committee—that of section 3040 and its application to HMOs. The Judicial Committee analysis statement is therefore not precendential and the *Swanson* court's reliance on it as a basis for

145. Swanson v. St. John's Reg'l Med. Ctr., 118 Cal. Rptr. 2d 325, 329 (Cal. Ct. App. 2002).

146. *Id.* at 329–30.

147. *See* CAL. CIV. CODE § 3040 (West 1993).

148. *Swanson*, 118 Cal. Rptr. 2d at 329–30.

149. *Analysis of S.B. 1471: Health Care Liens*, S. Judiciary Comm., 1999–2000 Reg. Sess. 4 (Cal. 2000) (as amended April 27, 2000), *available at* http://leginfo.public.ca.gov/pub/99-00/bill/sen/sb_1451-1500/sb_1471_cfa_20000503_084010_sen_comm.html (last visited Nov. 10, 2004). The *Swanson* court again neglected to read the cited authority in context. Immediately following the quoted passage, the Senate Judiciary Committee's analysis states: "Although in California hospitals have an independent right to assert a lien under California Civil Code section 3045.1, this case merely illustrates how the area of health care liens is evolving, as . . . consumers become aware of and challenge billing practices of health care service plans." *Id.*

150. Obiter dictum is defined as "[a] judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential." BLACK'S LAW DICTIONARY 1100 (7th ed. 1999); *see also* Parnell v. Adventist Health Sys./W., 131 Cal. Rptr. 2d 148, 56 (Cal. Ct. App. 2003), *cert. granted*, 69 P.3d 978 (Cal. 2003); Stockton Theatres, Inc. v. Palermo, 304 P.2d 7, 9 (Cal. 1956).

allowing balance billing under the HLA is unfounded and unpersuasive.[151]

In addition, the legislative history to section 3040 does not mention balance billing, its equivalent, or even acknowledge the practice. The only legislative limit imposed upon HLA liens is the 50 percent constraint of section 3045.4.[152] The most likely interpretation of the Committee's statement is that section 3040's balance billing limits do not affect the different constraints of section 3045.4. The 50 percent cap on HLA lien recovery follows the purpose of the HLA, seeking to ensure that a patient retains sufficient funds to address other losses resulting from his or her injuries. The legislative history cited by the *Swanson* court then is almost certainly an attempt to ensure that courts do not misconstrue section 3040's balance billing limits to disturb section 3045.4's HLA lien limitation. The analyst's statement in the legislative history of section 3040 does not accurately reflect California law with regards to balance billing under the HLA,[153] and the approach described in the *Nishihama* decision should govern subsequent California cases.

CONCLUSION

The current split in the California Courts of Appeal regarding balance billing practice in the context of the HLA has had a negative effect on both patients and medical care providers. Rising health care costs, along with a proliferation of new health care legislation, has caused confusion for judges, juries, and attorneys attempting to apply the HLA. The confusion has resulted in unnecessary litigation expenses as well as in opposing results between the California appellate districts. As the United States population continues to age and health care use becomes even more prevalent, either the California state legislature or the California Supreme Court must address the confusion and provide a well-reasoned and final answer to the current appellate court split.

The California Supreme Court will have the opportunity to resolve this split when it hears *Parnell v. Adventist Health Systems/West* during its 2004–2005 term.[154] Should the California Supreme Court consider the issue, it should follow the *Nishihama* court's interpretation of the HLA and disallow balance billing. The penchant of United States courts for contractual freedom mandates that medical care providers' negotiated rates limit a medical care provider's recovery by lien to those rates. Similarly, the legislative intent and history to the HLA favors an interpretation disallowing balance billing. Public policy in favor of

151. *See Parnell*, 131 Cal. Rptr. 2d at 156.

152. *Id.* at 157.

153. *Id.* at 156.

154. 131 Cal. Rptr. 2d at 148. The parties have concluded oral arguments but no date has been given for the California Supreme Court's opinion.

protecting innocent patients also mandates that courts bestow any windfalls on the injured party, rather than on medical care providers or third-party tortfeasors. Finally, similar statutes such as federal Medicaid law do not allow for balance billing by lien and provide an equitable example for the California courts to follow in the HLA context.

During the immediate future, and until legislative or California Supreme Court intervention, California appellate courts must consider the effects of balance billing on each party involved in a dispute. A careful analysis of the *Swanson* opinion reveals both inequitable reasoning and results with regards to the patient. As such, California courts should follow the *Nishihama* court's interpretation of the HLA and disallow balance billing by HLA lien. The *Nishihama* court's interpretation is more consistent with the text and purpose of the HLA and yields the more just and equitable result to all parties involved.

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